Telic Farm Sdn Bhd lwn Majlis Bandaraya Melaka Bersejarah

MAHKAMAH TINGGI (MELAKA) — GUAMAN SIVIL NO MT 1–22–69 TAHUN 2007
MOHTARUDIN BAKI H
3 JANUARY 2008

Prosedur Sivil — Rayuan — Penyalahgunaan proses — Keputusan badan awam — Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980 — Pindaan melalui PU(A) 342/2000 — Sama ada semestinya menfailkan semakan kehakiman — Sama ada satu penyalahgunaan proses mahkamah jika menfailkan writ saman untuk perintah deklarasi

Prosedur Sivil — Writ saman — Mencabar keputusan badan awam — Semakan kehakiman ditolak — Sama ada plaintif berhak menfailkan writ saman untuk mendapatkan relief-relief deklarasi — Sama ada res judicata

Defendan telah memberikan satu lesen kepada plaintif untuk menjalankan perniagaan penternakan ayam dan stor menyimpan makanan binatang. Yuran sebanyak RM4,000 telah dibayar oleh plaintif kepada defendan dan lesen tersebut adalah sah sehingga 31 Disember 2007. Walau bagaimanapun, satu notis penamatan lesen yang bertarikh 27 April 2007 telah dikeluarkan oleh defendan kepada plaintif. Plaintif telah membuat permohonan kebenaran untuk semakan kehakiman terhadap keputusan penamatan lesen tersebut dan permohonan tersebut telah berakhir dengan keputusan Mahkamah Persekutuan bertarikh 5 Februari 2007 di mana plaintif tidak boleh membuat semakan kehakiman terhadap notis-notis yang dikeluarkan oleh defendan. Plaintif menarik balik permohonan semakan kehakiman tersebut dan memulakan sekali lagi percubaan memohon perintah deklarasi melalui writ saman. Sebelum writ saman didengar plaintif telah memfailkan satu permohonan interim untuk, antara lain, menggantungkan pelaksanaan notis penamatan lesen tersebut tetapi ditolak. Defendan membangkitkan isu res judicata dan mengatakan bahawa tindakan untuk mencabar keputusan penjawat awam sepatutnya di bawah semakan kehakiman sahaja. Perayu dalam jawapan berhujah bahawa ianya bukan res judicata kerana plaintif memohon dua remedi yang berbeza, iaitu satu semakan kehakiman dan sekarang adalah writ saman.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Daripada fakta adalah jelas plaintif sekali lagi cuba memohon perintah-perintah untuk deklarasi, walhal isu yang sama telah diputuskan oleh Mahkamah Tertinggi di Malaysia. Ianya adalah 'vexatious' dan menyalahgunakan proses mahkamah (lihat perenggan 8).

(2) Tindakan plaintif adalah untuk mencabar keputusan defendan iaitu sebuah badan awam yang bertindak di bawah undang-undang. Tindakan untuk mencabar keputusan penjawat awam sepatutnya di bawah 'judicial review'. Ini selaras dengan pindaan kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT')melalui PU(A) 342/2000 iaitu mulai 22 September 2000 semua permohonan untuk mencabar keputusan pihak berkuasa awam hanya boleh dibuat melalui permohonan untuk semakan kehakiman (lihat perenggan 8–10).

(3) Dengan pindaan kepada A 53 KMT yang adalah pari materia dengan A 53 Supreme Court Rules di England, prinsip undang-undang yang diputuskan di dalam kes *O'Reilly v Mackman* [1982] 3 All ER 1124, adalah terpakai kepada kes-kes di sini. Oleh itu, berikutan kes-kes yang diputuskan selepas pindaan tersebut, jelas tindakan plaintif adalah satu penyalahgunaan proses mahkamah (lihat perenggan 14, 17–18).

(4) Permohonan plaintif adalah bersifat injunksi terhadap badan awam yang menjalankan tugas-tugas kesejahteraan awam. Dengan itu apa-apa kerugian, jika berjaya dibuktikan, boleh dipampas dengan kewangan (lihat perenggan 19–20).

[English summary

The defendant had granted a license to the plaintiff to run a chicken farm business and a store for storing animal feed. A fee of RM4,000 had been paid by the plaintiff to the defendant and the license was valid until 31 December 2007. However, a notice of termination of the license dated 27 April 2007 was issued by the defendant to the plaintiff. The plaintiff applied for leave for judicial review of the decision to terminate the license and the application ended with the decision of the Federal Court dated 5 February 2007 whereby the plaintiff could not judicially review the notices issued by the defendant. The plaintiff withdrew its application for judicial review and commenced another attempt seeking a declaratory order vide writ of summons. Before the writ of summons was heard the plaintiff had filed an interim application for, inter alia, stay of execution of the notice of termination of license but was dismissed. The defendant raised the issue of res judicata and contended that the action to challenge the decision of public officer should be only under judicial review. The appellant in its reply contended that it was not

res judicata as the plaintiff sought two different remedies, ie one for judicial review and now for writ of summons.

Held, dismissing the plaintiff's application with costs:

(1) From the facts, it was clear that the plaintiff was once again attempting to apply for the declaratory orders, when in fact, the same issues had been decided by the highest court in Malaysia. It was vexatious and an abuse of the process of the court (see para 8).

(2) The plaintiff's action was to challenge the defendant's decision, ie public authority acting under the law. The action to challenge the public officer should be taken under the judicial review. This was in line with the amendment made to O 53 of the Rules of the High Court 1980 ('RHC') vide PU(A) 342/2000 ie effective from 22 September 2000 all the applications to challenge the decision of the public authority could only be done by an application for judicial review (see paras 8–10).

(3) With the amendment to O 53 of the RHC which is in pari materia with O 53 of the Supreme Court Rules in England, the principles of law decided in *O'Reilly v Mackman* [1982] 3 All ER 1124, is applicable in the cases here. Thus, pursuant to the cases decided subsequent to the amendment, it was clear that the plaintiff's action was an abuse of the court's process (see paras 14, 17–18).

(4) The plaintiff's application was in the nature of an injunction against public body which was carrying out duties in keeping public order. Therefore any damages, if successfully proved, could be monetarily compensated (see paras 19–20).]

Nota-nota

Untuk kes-kes mengenai penyalahgunaan proses, lihat 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) perenggan 634–636.

Untuk kes-kes mengenai writ saman secara am, lihat 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) perenggan 8011–8157.

Kes-kes yang dirujuk

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567 (dirujuk)

Cocks v Thanet District Council [1982] 3 All ER 1135 (dirujuk)

Jamir Hassan v Kang Min [1992] 2 MLJ 46 (diikut)

Lim Oh & Ors v Allen & Gledhill [2001] 3 MLJ 481 (dirujuk)

O'Reilly v Mackman [1982] 3 All ER 1124 (diikut)

Shaharuddin bin Ali & Anor v Superintendant of Lands and Surveys & Anor [2005] 2 MLJ 555 (dirujuk)

Subramaniam Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Ors [2003] 6 CLJ 175; [2003] MLJU 94 (dirujuk)

Sugumar Balakrishnan v Chief Minister of the State of Sabah & Anor [1989] 1 MLJ 233 (dirujuk)

Teh Guan Teik v Inspector General of Police & Anor [1998] 3 MLJ 137 (dirujuk)

Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133 (dirujuk)

Undang-undang yang dirujuk

Akta Mahkamah Kehakiman 1964

Kaedah-Kaedah Mahkamah Tinggi 1980 A 18 k 19, A 53, A 53 k 1

Perlembagaan Persekutuan perkara 5(1), 8(1), 13(1)

Rules of the Supreme Court [UK] O 53

Mogan Karupiah (Mogan Karupiah) bagi pihak plaintif
Adillah A Nordin (Adillah A Nordin) bagi pihak defendan

Mohtarudin Baki H:

[1] Rayuan adalah oleh plaintif terhadap keputusan mahkamah ini pada 3 Januari 2008 menolak permohonan plaintif/perayu (kandungan 5) iaitu untuk mendapatkan:

(1) Satu perintah pengantungan interim (interim stay) diberikan terhadap defendan menggantungkan (staying) semua tindakan dengan apa cara jua pun oleh defendan daripada melaksanakan ketiga-tiga notis defendan bertarikh 12 Mac 2007 dan/atau 27 April 2007 yang dikeluarkan oleh defendan kepada plaintif, sehingga pendengaran dan keputusan muktamad atas 'prayer' 2, 3, 4 dan 5 di bawah ini dan atau perintah selanjutnya;

(2) Semua tindakan bagi melaksanakan notis defendan dengan Rujukan No MBMB/JPU/00082/A5(e)(99) bertarikh 12 Mac 2007 dan notis defendan dengan No Rujukan 00490/2005 bertarikh 22 Disember, 2005 dan notis defendan dengan No Rujukan 00500/2006 bertarikh 6 Januari 2006 terhadap plaintif oleh defendan dan atau pegawainya dan atau wakilnya dan atau agennya dan atau pekerjanya atau sesiapa pun digantungkan (be stayed) sehingga keputusan muktamad tindakan ini atau perintah selanjutnya;

(3) Semua tindakan oleh defendan dan atau pegawainya dan atau wakilnya dan atau agennya dan atau pekerjanya atau sesiapa pun bagi melaksanakan Notis Pembatalan Lesen Perniagaan Lesen Ternakan

Ayam dan Stor Menyimpan Makanan Binatang yang dikeluarkan oleh defendan bertarikh 27 April 2007 dengan apa cara jua pun terhadap plaintif di Lot No 1000, 1268, 1269, Tanjung Minyak, Mukim Air Salak, 75250 Melaka, digantungkan (be stayed) sehingga keputusan muktamad tindakan ini dan atau perintah selanjutnya;

(4) Semua tindakan oleh defendan dan atau pegawainya dan atau wakilnya dan atau agennya dan atau pekerjanya atau sesiapa pun bagi melaksanakan Notis Untuk Perlaksanaan Defendan bertarikh 27 April 2007 dengan apa cara jua pun terhadap plaintif di Lot No 1000, 1268, 1269, Tanjong Minyak, Mukim Air Salak, 75250 Melaka, digantungkan (be stayed) sehingga keputusan muktamad tindakan ini dan atau perintah selanjutnya;

(5) Plaintif dibenarkan meneruskan dengan perniagaan ternakan ayam dan stor menyimpan makanan binatang di harta plaintif di Lot No 1000, 1268, 1269, Tanjung Minyak, Mukim Air Salak, 75250 Melaka, selaras dengan Lesen Perniagaan bertarikh 28 Disember 2006 yang dikeluarkan oleh defendan tanpa dilarang atau dihalang atau diganggu atau ditahan oleh defendan atau pegawainya atau wakilnya atau agennya atau pekerjanya atau sesiapa pun dengan apa cara jua pun sehingga keputusan muktamad tindakan ini dan atau perintah selanjutnya;

(6) Relief lanjutan atau lain-lain relief, arahan atau perintah yang mahkamah yang mulia ini anggap suai manfaat; dan

(7) Kos tindakan ini dibayar oleh defendan kepada plaintif.

[2] Alasan-alasan permohonan adalah seperti berikut:

(a) Plaintif telah membayar yuran RM4,000 kepada defendan dan defendan telah mengeluarkan lesen untuk plaintif menjalankan perniagaan penternakan ayam dan stor menyimpan makanan binatang sehingga 31 Disember 2007;

(b) Plaintif tidak melanggar atau memungkiri syarat-syarat atau terma-terma lesen tersebut;

(c) Defendan tidak mengikut peraturan dan prosedur di bawah undang-undang yang tertentu apabila mengambil tindakan menamatkan perniagaan penternakan plaintif;

(d) Keputusan Mahkamah Persekutuan bertarikh 7 Februari 2007 tidak langsung berkaitan dengan perniagaan penternakan ayam plaintif dan atau lesen penternakan ayam yang dikeluarkan oleh defendan kepada plaintif yang sah sehingga 31 Disember 2007;

(e) Defendan telah tidak memberi peluang atau membenarkan plaintif menunjuk sebab kepada defendan mengapa lesen penternakan ayam plaintif tidak sepatutnya ditamatkan sebelum defendan memutuskan dan mengambil tindakan untuk mengeluarkan Notis Penamatan lesen bertarikh 27 April 2007 dan atau Notis Perlaksanaan juga bertarikh 27 April 2007;

(f) Keputusan dan tindakan defendan bagi menamatkan perniagaan penternakan plaintif melalui notis bertarikh 27 April 2007 tersebut adalah satu keputusan sangat 'drastic and draconian' dan telah diambil secara 'unilaterally';

(g) Keputusan dan tindakan defendan bagi menamatkan perniagaan penternakan plaintif melalui notis bertarikh 27 April 2007 tersebut adalah satu keputusan yang melanggar dan atau memungkiri perkara 8(1), 5(1) dan 13(1) Perlembagaan Persekutuan Malaysia;

(h) Keputusan dan tindakan defendan bagi menamatkan perniagaan penternakan plaintif melalui notis bertarikh 27 April 2007 tersebut adalah satu keputusan yang melanggar dan memungkiri prinsip-prinsip 'natural justice';

(i) Latar belakang dan fakta-fakta kes ini dan peristiwa yang telah berlaku seperti yang disebut di dalam afidavit Chin Nam Yee di sini, ianya adalah amat penting dan satu langkah yang adil patut dan munasabah untuk defendan mengadakan satu perjumpaan atau perundingan dengan plaintif sebelum defendan mengeluarkan notis bertarikh 27 April 2007;

(j) Ianya juga jelas memandangkan latar belakang dan fakta-fakta kes ini dan juga keadaan-keadaan dan peristiwa-peristiwa yang telah berlaku bahawa defendan yang tidak bertindak secara 'fair and impartial' apabila mengeluarkan notis bertarikh 27 April 2007:

(k) Defendan adalah sebuah badan berkanun (a statutory body) dan wajib mematuhi segala tugas-tugas dan atau obligasi 'principles of natural justice' yang merupakan satu pra syarat 'governing the exercise of a statutory power'. Dalam kes ini pra syarat tersebut tidak memuaskan oleh defendan; dan

(l) Ketiga-tiga notis defendan bertarikh 22 Disember 2005, 6 Januari 2006 dan 15 Februari 2006 atas apa yang telah berlaku pada perjumpaan pada 7 Februari 2006 'were no longer extant'.

LATAR BELAKANG KES

[3] Atas fakta kes yang sama plaintif/perayu telah membuat permohonan izin untuk semakan kehakiman (judicial review) yang berakhir dengan

keputusan Mahkamah Persekutuan pada 5 Februari 2007 di mana plaintif/perayu tidak boleh membuat semakan kehakiman terhadap notis-notis yang dikeluarkan oleh defendan/responden.

[4] Lantaran itu plaintif/perayu menarik balik permohonan semakan kehakiman tersebut. Sekarang di hadapan saya satu lagi percubaan memohon perintah deklarasi melalui writ saman. Sebelum writ saman didengar plaintif/perayu memohon perintah 'interim stay' tindakan defendan/responden di mana saya menolaknya dengan kos.

ISU UNDANG-UNDANG

Pertama

[5] Peguam responden/defendan berhujah bahawa isu yang dipertikaikan sekarang adalah res judicata, memandangkan Mahkamah Persekutuan telah membuat keputusan tentang isu yang sama, iaitu mengenai notis tindakan oleh Majlis Bandaraya Melaka Bersejarah, iaitu sebuah badan awam (public body).

[6] Peguam perayu/plaintif pula berhujah, ianya bukan res judicata kerana plaintif/perayu memohon dua remedi yang berbeza; satu 'judicial review' dan sekarang 'writ of declaration'.

[7] Saya bersetuju dengan penghakiman YA Haidar Hakim Mahkamah Tinggi (ketika itu) di dalam kes *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 di ms 56:

> Further the court is entitled to look at the history of this case to determine whether the pleadings disclose a cause of action. This is what Lord Parker CJ said in *Re Vernazza* at p 202:
>
> > In considering whether any proceedings are vexatious one is entitled to and must look at the whole story of the matter and it is not determined by whether the pleading discloses a form of action. Indeed that is the principle applied under the rules of court when application is made to strike out a pleading. Though the pleading may be in order, the court in its inherent jurisdiction is entitled to look at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed.

[8] Adalah jelas dari latar belakang kes ini, plaintif/perayu cuba sekali lagi, walhal isu yang sama telah diputuskan oleh Mahkamah Tertinggi di Malaysia.

Ianya adalah 'vexatious' dan menyalahgunakan (abuse) proses mahkamah.

Kedua

[9] Tindakan plaintif/perayu adalah untuk mencabar keputusan defendan/responden iaitu sebuah badan awam yang bertindak di bawah undang-undang. Tindakan untuk mencabar keputusan penjawat awam sepatutnya di bawah 'judicial review'.

[10] Ini selaras dengan pindaan kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 melalui PU(A) 342/2000 iaitu mulai 22 September 2000 semua permohonan untuk mencabar keputusan pihak berkuasa awam hanya boleh dibuat melalui permohonan untuk semakan kehakiman (judicial review).

[11] Keadaan yang sama berlaku di England di mana selepas 1977 (Law Reform) keadaan berubah. Ini jelas diputuskan di dalam kes-kes berikut:

(i) *O'Reilly v Mackman* [1982] 3 All ER 1124, isu yang perlu diputuskan dalam kes ini adalah seperti berikut:

> The issue before the House of Lords is whether it is an abuse of the process of the court for the plaintiffs to commence a writ action to challenge a decision of a public authority, instead of proceeding by way of judicial review. The relevant part of the headnote reads:
>
> > Held, dismissing the appeals, that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was a declaration that the board of visitors adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoiding the protection afforded to statutory tribunals.

(ii) *Cocks v Thanet District Council* [1982] 3 All ER 1135, Lord Bridge of Harwick memutuskan seperti berikut:

> It follows from these considerations that proceedings in which an unsuccessful applicant for accommodation under the 1977 Act sets out to challenge the decision of the housing authority against him will afford another application of Lord Diplock's general rule and will amount to an abuse of the process of the court if instituted otherwise than by an application for judicial review under O 53.

[12] Kes-kes yang diputuskan di Malaysia *sebelum pindaan* kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 pada tahun 2000 adalah seperti berikut: **A**

(i) *Sugumar Balakrishnan v Chief Minister of the State of Sabah & Anor* [1989] 1 MLJ 233, isu yang dibangkitkan; Defendan pertama dalam tindakan ini memohon kepada mahkamah untuk membatalkan permohonan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidang kuasa tersirat mahkamah. Alasan permohonan defendan adalah permohonan plaintif walaupun dalam bentuk deklarasi, tetapi 'in substance and effect' adalah untuk memohon satu perintah certiorari dan ianya telah dibuat tanpa memohon kebenaran sebagaimana yang dikehendaki di bawah A 53 k 1 dan dengan demikian, ianya adalah suatu penyalahgunaan proses mahkamah. Defendan pertama bergantung kepada dua kes di England iaitu kes *O'Reilly v Mackman & Ors* dan *Cocks v Thanet District Council*, Mahkamah Tinggi memutuskan bawah Held (1): **B** **C** **D**

> The cases of *O'Reilly v Mackman & Ors* [1982] 3 All ER 1124 and *Cocks v Thanet District Council* [1982] 3 All ER 1135 were based on the new provisions of the English O 53 which was introduced in 1977. They cannot be followed since the new English O 53 and its statutory underpinning (under s 31 of the UK Supreme Court Act) have not been accepted here. **E**

di ms 236:

> With due respect, the ratio decidendi in the aforesaid two English cases cannot be followed here since we have not accepted the English new O 53 and its statutory underpinning (that is to say, s 31 of the English Supreme Court Act). Our present O 53 is in pari materia with O 53 under the pre-1977 English Rules. Therefore, there is no justification for me to depart from the principle enunciated by the highest court in England prior to January 1978 (the date of coming into force of the English new Rules) and which had been accepted by our courts. I am inclined to follow the decision in the Supreme Court case of *Government of Malaysia v Lim Kit Siang*; *United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12, whereby the majority of the quorum declined to follow the English new O 53 in relation to the rule of locus standi, and instead followed the rule of locus standi accepted by the highest court in England prior to the said new O 53. **F** **G** **H**

(ii) *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137, isu yang dibangkitkan, isu yang dibangkitkan di Mahkamah Persekutuan ialah tentang apakah prosedur yang betul bagi seorang anggota polis yang dibuang kerja untuk mencabar keputusan tersebut yang dibuat oleh pihak berkuasa tatatertib iaitu sama ada melalui satu deklarasi atau certiorari atau salah satunya. YA Peh Swee Chin memutuskan: **I**

The entrenched principle that declaration and certiorari are not mutually exclusive and are concurrent remedies was asserted several times in the United Kingdom and followed by our courts. First and foremost, O 15 r 16 of the Rules of the High Court 1980 provides for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought. To dislodge such a remedy by declaration from its entrenched position would require clear and strong words from a statute (see pp 147F and 148D, H); *Government of the Federation of Malaya v Surinder Singh Kanda* [1962] MLJ 169; *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136 and *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 followed.

di ms 148:

The defendant also raised a preliminary point that the High Court had no jurisdiction to adjudicate on the matter by declaration and that it could only be done by certiorari. It appears that the plaintiffs discovered the position of the lack of authority of the port manager 2½ years after the said suspension, long after the time limit for applying for certiorari. The Court of Appeal unanimously held that the court had jurisdiction to grant a declaration, overruling the preliminary objection or point. Lord Denning said at p 1009; 'If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitation and may not be available. Why then should not the court intervene by declaration and injunction?

The next is *Vine v National Dock Labour Board* [1957] 2 WLR 106, in which the plaintiff claimed for a declaration that his dismissal was void, *ultra vires* and illegal. A preliminary point from the defendant that the claim was incompetent and the only remedy was by certiorari was raised and dismissed. The House of Lords upheld the decision and held that the court had jurisdiction to grant the declaration.

Yet another is the case of *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260. Pyx claimed declarations in court that certain ministerial decisions were invalid in regard to their proposed development of their land. The Minister raised the objection that the court had no jurisdiction to grant a declaration asked for, on the ground that Pyx should have applied to the local authority to determine the proposed development under s 17 of the Town and Country Planning Act 1947. It was held that the provision of an alternative method of having the question determined did not preclude the court from granting declaration. Viscount Simonds made, in the course of delivering judgment, the dictum cited earlier. In the same case, Lord Goddard, who dealt with the argument advanced that if there was a remedy in the High Court, it must be by way of certiorari and not by declaration, had this to say at p 290.

> I know of no authority for saying that if an order or decision can be attacked by certiorari, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive.
>
> In passing, also in order to lay any possible spectre of any future contention of per incuriam against the present decision of this court for not mentioning the case of *O'Reilly v Mackman* [1982] 3 All ER 1124 which held the litigant in that case to a remedy of certiorari and not allowing the remedy of declaration, I will say a few words about this case.
>
> Of course, it was feared that the remedy of declaration would virtually destroy the remedy of certiorari by replacing the latter and this, inter alia, led in 1977 to the law reform as embodied in O 53 of the Rules of the Supreme Court of England which is different from our own O 53 of the RHC. Order 53 of England brought ten main changes to the earlier O 53, according to the *White Book* of 1979 at p 842; please see the changes set out there. The House of Lord's decision of *O'Reilly v Mackman*, in interpreting such changes brought about by the law reform has, according to the guru of administrative law Prof Wade in *Administrative Law* (6th Ed) at p 678, caused 'great uncertainty' and 'a serious setback for administrative law'. The decision was expressly not followed, for obvious reasons, in our courts, eg in *Sugumar*'s case and it was also not followed by the Court of Appeal of Singapore. The decision is not relevant to us and need not be discussed further, based as it was on the law reform, which we have, with all deliberateness, not adopted in our RHC.

[13] Di dalam kes tersebut di atas, mahkamah telah memutuskan bahawa certiorari dan deklarasi adalah 'mutually exclusive'. Mahkamah telah menolak prinsip undang-undang yang diputuskan di dalam kes *O'Reilly v Mackman*, kerana pada ketika itu peruntukan A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 yang terpakai di negara ini adalah berbeza dengan Supreme Court Rules di England.

[14] Walau bagaimanapun dengan pindaan kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 yang adalah pari materia dengan A 53 Supreme Court Rules di England, prinsip undang-undang yang diputuskan di dalam kes *O'Reilly v Mackman*, adalah terpakai kepada kes-kes di sini. Kes-kes tersebut akan dibincangkan selanjutnya.

[15] Melalui PU(A) 342/2000, A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 telah dipinda secara keseluruhannya yang mana keseluruhan prosedur dipanggil 'Permohonan Untuk Semakan Kehakiman'.

[16] Remedi yang terkandung di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 yang baru ini adalah lebih luas dengan memasukkan relief-relief yang dinyatakan di dalam perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 dan juga perintah deklaratori dan injunksi.

[17] Pindaan kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ini adalah pari materia dengan peruntukan Supreme Court Rules di England selepas tahun 1977. Kes-kes yang telah diputuskan selepas pindaan kepada A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah seperti berikut:

(i) *Shaharuddin bin Ali & Anor v Superintendant of Lands and Surveys & Anor* [2005] 2 MLJ 555, isu yang diputuskan dalam kes ini adalah seperti berikut:

> The issues for consideration before the court were (a) whether the plaintiffs were by this suit seeking relief or remedy for the infringement of rights protected by public law or private law; and (b) if it is held that the plaintiffs were enforcing their rights under public law and should therefore seek their remedy under O 53 of the Rules of the High Court 1980 ('RHC'), whether their claims fell within the exceptions to the general principal stated in *O'Reilly v Mackman*.

YA hakim di ms 565 memutuskan:

> I regret I do not agree with the above submissions and say so for the following reasons: In the first place, both the Minister (who issued the direction) and the first defendant (who rejected the plaintiffs' claims to compensation) acted under powers conferred upon them by s 5(3) of the Land Code, and are public authorities whose decisions are subject to supervisory control of the court through process of judicial review under O 53 of the RHC. In the second place, although the plaintiffs say that the native customary rights which they claim to have over the said lands are pre-existing rights and proprietary rights which are private rights, it was pointed out by counsel for the defendants, and in my view correctly, that native customary rights by reason of s 5(1) of the Land Code can only be created or acquired 'as from 1 January 1958' by any of the methods specified in sub-s (2), upon Interior Area Land and s 5(2) spells put 'the methods by which native customary rights may be acquired', while proviso (ii) to sub-s (2) reads:
>
> > the question whether any such right has been acquired or has been lost or extinguished, save in so far as this Code makes provision to the contrary, be determined by the law in force immediately prior to 1 January 1958.
>
> ...
>
> So although the plaintiffs say that the native customary rights which they claim to have acquired (through persons who had created those rights before 1958) are proprietary in nature, the fact remains that the

rights which they claim are rights created or recognised by statute, or put in another way, they are rights protected by public law. The plaintiffs' alleged native customary rights do not arise out of any private contract or arrangement between the plaintiffs and the government (the defendants here), or put in another way, there is no infringement of a right of the plaintiffs arising under private law.

It is for the above reasons that I agree with the contention of counsel for the defendants that the plaintiffs' remedy to enforce or protect rights created or acquired or recognised in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs here should have proceeded to seek judicial review of the Minister's direction and first defendant's decision under O 53 of the RHC, unless of course they can bring themselves within the exceptions to the general rule stated in *O'Reilly v Mackman* which is the next question I will address.

Do the plaintiffs' claims fall within the exception to the rule in *O'Reilly*'s case?

Lord Diplock recognised that there were certain exceptions to the general rule referred to by him in that case. This is what he said at p 285:

> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.

...

… The plaintiffs say none of the parties objected to their writ action. I do not think this accurately describes what has happened here. The defendants' application did include a prayer, in the alternative, that the plaintiffs' writ of summons and statement of claim be struck out on the grounds, inter alia, that the plaintiffs' action is an abuse of the process of court. Although the defendants did not initially address the court on the issue of abuse of process and it was the court that invited the parties to do so, I did not think it wrong to do so as the court is always vigilant to see that its process is not abused and the facts before the court called for a closer scrutiny of the route taken by the plaintiffs. Accordingly, I do not think this exception avails itself to the plaintiffs.

...

It is also my view that the first prayer sought by the plaintiffs herein, that the said direction was 'null and void and of no legal effect', although couched or cast and sought as a declaration, is clearly in the nature of a certiorari to have the direction quashed for the same

grounds and reasons stated in the suit, but the plaintiffs have attempted to circumvent the protections afforded to public authorities by O 53 of the RHC, particularly the requirement to obtain leave.

In arriving at the above conclusions I have not overlooked a submission of the plaintiffs that the court should not by the mere characterisation of the plaintiffs' claim as one founded in public law, exclude them from having their claims considered by an, ordinary action. According to counsel for the plaintiffs, to do so would create procedural exclusivity or dual system of law leading to rigidity and procedural hardship for plaintiffs in the choice of forms of action, which would defeat the flexibility which the new O 53 of the RHC was supposed to afford when seeking relief. According to counsel this was especially so as there is no saving provision found in our O 53 which is equivalent to the English O 53 r 9(5) which allows the court to convert an application for judicial review into a writ action in the event the wrong form of action was selected. I have tried in the course of this judgment to show that for the reasons given, this is not a case where the plaintiffs' claims have been simply characterised as one arising in public law. Further, since the amendment to O 53 of the RHC, all the reliefs and remedies which the plaintiffs seek in this action were at its commencement available to them under O 53 and the court has not put any obstacles in their way to avail themselves of the flexibility afforded by the new O 53, but if they have not availed themselves of it the court should not be blamed for any hardship they now face as a result of the route they have chosen. With regard to the submission that the court should not interpret the new O 53 in such a way as to create rigidity and procedural exclusivity leading to a dual system of law, I should point out that the courts in Malaysia have for a long time now recognised the distinction between public law rights or remedies and private law rights or remedies. See *Baltim Timber Sdn Bhd v The Minister of Resource Planning & 2 Ors* [1993] 2 CLJ 327; see *Subramaniam a/l Vythilingam v The Human Rights Commissioner of Malaysia (Suhakam) & 5 Ors* [2003] 6 CLJ 175; [2003] MLJU 94; see *Yahya bin Kassim v Government of Malaysia* [1997] 3 MLJ 749; see *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287.

The Minister's direction extinguishing the alleged native customary rights of the plaintiffs was dated 14 November 2001 (see para 7 of the statement of claim). The plaintiffs knew about this direction because on 4 March 2002 they submitted their claims for compensation. Under O 53 r 3(6) of the RHC an application for leave to apply for judicial review must be made within 40 days when the grounds for the application first arose or when the decision is first communicated to the applicant. The plaintiffs certainly knew of the direction prior to 4 March 2002 when they submitted their claim for compensation to the first defendant. When this action was commenced on 14 November 2001 more than eight months had passed since the direction was made. No application had been made by the plaintiffs to extend the statutory period to apply for leave. So it is unlikely leave

would have been granted. In addition to what is said above, it should be noted that the plaintiffs had originally proceeded as if they accepted the validity or legality of the Minister's direction by submitting their claims for compensation pursuant to the direction. It was only when their claim for compensation was rejected that they questioned the legality of the direction. ….

In the result, for all the reasons given above, I hold that it was an abuse of process for the plaintiffs to resort to an action for declaration and thereby evade the clear requirements of O 53 of the RHC.

(ii) *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481, YA Steve Shim memutuskan:

Given the view which we take that there was clearly in existence a peremptory order of the court, and that the learned SAR had struck the appellants' first suit out for disobedience of that peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court.

(iii) *Subramaniam Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Ors* [2003] 6 CLJ 175; [2003] MLJU 94, mahkamah memutuskan di Held (3a) seperti berikut:

The plaintiffs should have pursued his public law remedy through judicial review proceedings under O 53 of the RHC and not by way of originating summons. By not pursuing the remedy through O 53, the plaintiff was deliberately attempting to get around the stringent requirements enumerated in O 53 of the RHC, including, inter alia, the need to serve the leave application on the Attorney General's Chambers. Enclosure (1) thus constituted an abuse of the process of the court and to be struck out.

(iv) *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567, mahkamah di ms 590–591 telah memutuskan seperti berikut:

Now assuming that there was a duty on the fourth defendant to act in a particular manner towards the property of the plaintiffs post collapse, such duty must find its expression in public and not private law. Accordingly, if there had been a failure on the part of the fourth defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review.

[18] Dari keputusan kes-kes di atas jelas tindakan plaintif/perayu adalah satu 'abuse of process of the court'.

Ketiga

[19] Permohonan plaintif/perayu adalah bersifat injunksi terhadap badan awam yang menjalankan tugas-tugas kesejahteraan awam. Saya merujuk kepada kes *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133. Held, (2) seperti berikut:

> (2) Public interest is always a relevant consideration in granting specific relief. As the offending pylon formed part of the national grid for the conveyance of electricity, it was therefore clear that, if a mandatory injunction was maintained, there will be disruption of electricity supply in Peninsula Malaysia and it was not in the public interest that such a disruption should occur. The learned judge in this case failed to take into account public interest. If so, the learned judge would have held that the public interest outweighed the respondent's interest. Acordingly, the mandatory and prohibitory orders made by the court below were set aside.

YA Hakim Gopal Sri Ram JCA di ms 138 mengatakan:

> That brings us to the question of remedy. The evidence on record shows that the offending pylon forms part of the national grid for the conveyance of electricity. It is therefore clear that if a mandatory injunction is maintained there will be disruption of electricity supply in Peninsular Malaysia. It is not in the public interest that such a disruption should occur.
>
> In *Smith v Inner London Education Authority* [1978] 1 All ER 411, Browne LJ held that public interest was always a relevant consideration in granting specific relief. This is how he put it (at p 422g–h of the report):
>
> > I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.
>
> No doubt that was said in the context of an interlocutory injunction. But we do not regard the principle to be any different in the case of a final injunction, whether prohibitory or mandatory in nature.
>
> The learned judge in this case failed to take into account public interest. If the learned judge had done so he would have held that the public interest outweighs the respondent's interest. Accordingly we would set aside the mandatory and prohibitory orders made by the court below. This suit is now remitted to the High Court for assessment of damages.

[20] Dengan itu apa-apa kerugian (jika berjaya dibuktikan) boleh dipampas dengan kewangan.

[21] Dengan alasan-alasan di atas saya memutuskan permohonan plaintif/perayu di dalam lampiran 5 ditolak dengan kos.

Permohonan ditolak dengan kos.

Reported by Brendan Navin Siva